8-1901-11220-2
MN OSHA Division Docket No. 5692
OSHI ID No. T5749 009-96

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DIVISION OF

Gary W. Bastian, Commissioner,
Department of Labor and Industry,
State of Minnesota,
Complainant,

v.

Industrial Containers & Dumpbox Manufacturing, Inc.,
Respondent.

FINDINGS OF FACT, CONCLUSIONS AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on July 29, 1997 at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of and Order for Hearing and Notice to Employees dated June 23, 1997.

Becky Austing, Industrial Containers and Dumpbox Manufacturing, Inc., 6840 Dixie Avenue, P.O. Box 2181, Inver Grove Heights, MN 55076, appeared on behalf of Industrial Containers & Dumpbox Manufacturing, Inc. (Respondent). Susan Gretz, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106, appeared on behalf of the Commissioner of the Minnesota Department of Labor and Industry (Complainant). The record closed at the conclusion of the hearing on July 29, 1997.

NOTICE

Notice is hereby given that under Minn. Stat. § 182.664, subd. 5, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following service by mail of this decision. The procedures for appeal are set out at Minn. Rs. Ch. 5215 (1995).

STATEMENT OF ISSUES

The issues in this proceeding are as follows:

A. Whether the Respondent committed the Occupational Safety and Health violations charged by the Complainant which relate to the following conditions, acts and omissions:

* Unguarded and exposed fan blades, belts and pulleys;

* Commingled cylinders of oxygen and acetylene;

* No written AWAIR Program;

* Improper equipment (exhaust fan) in a spray painting area;

* No hazard assessment to determine the need for personal protective equipment;

* The modification of a forklift truck without the manufacturer's prior approval;

* Use of an industrial forklift truck missing a lug nut;

* Use of a damaged sledge hammer (maul);

* Inadequate protection from the rays generated by welding operations;

* Uncovered outlet and switch boxes, exposed wires, and an opening in a circuit breaker panel;

* Equipment not protected from overcurrent;

* No seat belts on a forklift truck;

* No safety latches (mousing) on hoist hooks;

* Movable stairs in the entry to an employee break room.

B. Whether the penalties and abatement dates proposed by the Complainant were properly and reasonably calculated.

C. Whether the violations committed by the Respondent are moot because the Respondent no longer has any employees and is being dissolved.

D. Whether the Complainant's inspection was limited to those safety issues set forth in the employee complaint which led to the inspection.

E. Whether the Complainant is estopped from charging Respondent with violations that existed at the time of a prior inspection but which the Complainant did not cite or order the Respondent to correct.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Timothy M. Tierney is a senior occupational safety and health (OSH) investigator for the Minnesota Department of Labor and Industry. He has a B.S. degree in technology from Purdue University and has worked for

the Department as a compliance officer (CO) for the past seven years. During that period, he has conducted approximately 700 inspections. Most of those inspections have involved manufacturing facilities governed by general industry standards promulgated by the Department. He has a substantial amount of experience in the inspection of heavy industry including metal forming and fabricating operations.

On July 2, 1996, Tierney conducted an occupational safety and health inspection of the Respondent's plant in Inver Grove Heights, Minnesota. He was accompanied by David Miller who also is a senior safety investigator. They conducted the OSH inspection in response to an employee complaint. (Ex. 4). They had conducted a similar inspection in 1995. The employee complaint listed 15 safety concerns. Among other things, the complaint related to the storage of oxygen and acetylene tanks, the lack of cover plates on electrical outlet and switch boxes in the break room, defective mousing on the A-frame hoist, and the unavailability of welding screens to prevent exposure to welding rays.

The Respondent's welding shop in Inver Grove Heights is involved in the fabrication, welding and painting of roll-out boxes and dumpboxes used to collect waste at construction sites. Frank Rauschnot is the owner of the corporation. Prior to the time the business was incorporated, Rauschnot operated it under the name of Frank's Welding and Repair. At the time of the inspection, Respondent had at least one employee.

On July 2, 1996, when Tierney and Miller arrived at the Respondent's plant, they asked to speak to a management representative. They were referred to Becky Austing. At that time they introduced themselves, presented their credentials, and explained the purpose of their visit. Twenty minutes into their opening conference Rauschnot joined their discussion. He was extremely hostile and angry just as he had been the year before. He yelled at the investigators and shouted anti-government obscenities to them. As a result, the opening conference was curtailed and the COs began their walkaround inspection of the facility accompanied by Austing. She expressed no objection and remained with Miller and Tierney throughout the course of the two-hour inspection. During this time Rauschnot came and went. Whenever he was with the walkaround group, he was hostile, red-faced and angry. However, there is no evidence that he objected to the inspection, demanded a warrant, or inquired about his right to refuse an inspection. Rauschnot only objected to the inspection of an abrasive blasting operation in progress at the time of the inspection. No citation was issued with respect to that operation.

During the walkaround, the inspectors observed a wall-mounted exhaust fan in the outside wall of the plant near the northwest corner. The fan's belt and pulleys and the periphery of the fan's blade were less than seven feet above the floor. The fan, which was used during painting operations and to circulate air, was unguarded on the outside of the wall. On the inside, the guard enclosing the belt and pulleys on the driveshaft had openings in excess of

one-half inch thereby exposing employees to the nip points between the belt and pulleys. The smallest opening in the guard was three-quarters of an inch making the nip points on the pulleys accessible. On the outside, the fan blade was accessible to employees when moving or removing barrels located near the fan or when maintaining the outside of the premises. It would have been a relatively simple task for the Respondent to put a guard on the outside of the fan and to replace the guard on the inside. Respondent's employees could have welded the guards in place.

During their inspection Tierney and Miller also observed oxygen and acetylene cylinders which were intermixed on the same side of a steel plate which apparently had been erected to serve as a fire wall. Intermixing the cylinders exposed employees in the plant to a risk of injury from an explosion or a large, active fire. The condition could have been readily corrected by separating the oxygen cylinders from the acetylene cylinders by a minimum distance of 20 feet or by separating them with a noncombustible barrier at least five feet high and having a fire resistance rating of at least one-half hour.

The wall-mounted exhaust fan and the Respondent's storage of oxygen and acetylene cylinders were the subject of citations issued in 1994. On June 13, 1994, Michael Wallen, a senior safety investigator, conducted a safety inspection of the Respondent's work site at 6840 Dixie Avenue East in Inver Groves Heights, Minnesota, in response to an employee's safety complaints. Following Wallen's inspection, the Complainant issued a citation and penalty notice charging Respondent's predecessor -- Frank's Welding and Repair -- with the following OSH violations, among others:

A. Citation 1, Item 3. A serious violation of 29 C.F.R. § 1910.212(a)5, 1910.219(d)(1) and (e)[(1)(i)] on the grounds that a "[f]an blade guards were not provided where the periphery of the blades was less than seven feet from the floor or working level; and Pulley(s) with parts seven feet or less from the floor or work platform and component belt(s) were not guarded in accordance with the requirement specified at 29 C.F.R. § 1910.219(m) and (o):

On the 36 in. wall-mounted ventilation fan with 4 exposed metal blades and a belt and pulley drive system open to inadvertent contact." Ex. 1.

B. Citation 2, Item 3. A nonserious violation of 29 C.F.R. § 1910.253(b)(4)(iii); Oxygen cylinders in storage were not separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20-feet (6.1m) or by a noncombustible barrier at least 5-feet (1.5m) high having a fire resistance rating of at least 1/2 hour:

> in the shop area where Oxygen and Acetylene cylinders were in the same area. Ex. 1.

These citations were not contested and became a final order of the Commissioner before the July 2, 1996 inspection.

At the time of the July 2, 1996 inspection, Tierney requested to see the Respondent's written workplace accident and injury reduction (AWAIR) program. Respondent, having no such program in place, was unable to produce a copy. A written AWAIR program is required under Minn. Stat. § 182.653, subd. 8. The statute generally requires an overall safety and health plan identifying workplace hazards and assigning methods to correct them. AWAIR programs benefit employees by reducing the number of occupational injuries and benefit employers by reducing workers' compensation costs and other expenses incurred as a result of employee injuries. An AWAIR program would be beneficial to an operation like that of the Respondent's. Apart from the usual hazards that might exist in a workplace, welding operations create unique threats to worker safety. Respondent should have been able to prepare an initial AWAIR program plan by September 27, 1996.

The Respondent also had not made a hazard assessment of the plant, to determine if any hazards were present or likely to be present which would have necessitated the use of personal protective equipment. Ms. Austing admitted that no hazard assessment had been made and that there was no written certification document showing that the plant had been evaluated, the name of the person who performed the evaluation, or the dates when hazard assessments were made. There were a number of hazardous conditions at the Respondent's plant which may have necessitated the use of personal protective equipment. They included the accumulation of welding gases, which may have necessitated the use of respirators, and welding rays, which could have caused burns and eye damage necessitating the use of special goggles or other protective equipment.

During the walkaround Tierney and Miller also inspected those areas of the plant where the Respondent performed paint-spraying activities. The exhaust fan used during spray painting operations, which was located near the northwest corner of the shop, was equipped with a motor that was not approved for deposits of combustible residues and for Class I hazardous locations, and the belt and pulleys driving the fan were located in the duct work/air flow. In addition, electrical outlet receptacles and related equipment and conduit on the west wall of the spray painting area was of the general purpose type. It was not approved for Class I locations.

Spray painting around electrical equipment can result in two hazardous conditions. First, spray paints used at the plant contained flammable thinners. During spray painting operations there is an accumulation of vapors and mists containing flammable thinners. This creates a fire hazard. Also, the accumulation of spray painting residues on fan motors, for example, has an insulating effect which increases the internal temperature of the motor and can lead to spontaneous ignition and explosion. To avoid these problems, manufacturers usually have all electrical components of an exhaust fan outside the duct work and enclose the pulleys and belts of the motor to eliminate the accumulation of flammable residues.

In the plant the Respondent had a powered industrial truck (forklift) which was in use or available for use. It was a York forklift which had been manufactured by Elder & Company. Sometime after it was originally manufactured, the purchaser added counterweights to the rear of the forklift and wheel hubs from a truck were welded onto the wheels of the forklift so that the forklift could be used to haul raw materials and heavy roll out boxes. Respondent was unable to provide written authorization from the manufacturer for the modifications that had been made. The counterweights exceeded the forklifts load rating, caused the rear wheels to cant inward, and caused the tires to flatten when starting and stopping. The strength of the welded wheels is unknown and the alterations made to the forklift affected its capacity and safe operation and increased the risk of injury to Respondent's employees. Use of the counterweights and truck tires made the forklift less stable and hard to steer, putting it at risk of tipping over or losing its load. In either case, the driver or nearby employees could be seriously injured. The risk of injury was compounded because a lug nut was missing from the left rear wheel. Ex. 12.

At the time of the inspection, Tierney and Miller found a damaged maul (sledge hammer). It was located on a bench on the east wall of the shop. The maul's handle was split and the head was improperly seated. The handle had been taped to reduce the risk of pinching or slivers. Ex. 13. Because of extensive damage to the handle and the fact that the head of the maul was not properly seated and secured, persons using the maul or those nearby were exposed to the risk that the handle might break or the head of the maul becoming dislodged. The Respondent's representatives admitted that the maul was in regular use.

At the time of the inspection, Respondent's employees were engaged in welding operations. Employees and any other persons near the welding operations were not protected from the rays generated in the welding process by noncombustible or flame-proof screens or shields. Ex. 14. At close range welding rays can cause skin burns and severe eye burns. Repeated exposure can also lead to cataracts. Austing showed Tierney a shield allegedly used to prevent employee exposure to welding rays. Ex. 14. The barrier, which was approximately three foot square, had to be "drug out" from under a staircase which was blocked by a table and other materials making it difficult to remove. The barrier, had it been in use, was too small to be effective. It failed to protect employees from welding rays.

In the plant, electrical equipment was not free from hazards that were likely to cause death or serious physical harm to employees. Live parts of electric equipment operating at 50 volts or more were not guarded against accidental contact and several outlet boxes in completed installations did not have a cover, face plate or fixed canopy. More specifically, two duplex receptacles in the plant did not have covers in place. A duplex receptacle and a toggle switch in the break room did not have a cover in place, and two live (hot) wires from the duplex receptacle were exposed. Also, an opening existed in a circuit breaker panel due to the removal of a circuit breaker. These conditions

subjected the Respondent's employees to the risk of shock or electrocution from 110 or 220 volts of electricity[1]. Ex. 15.

The Respondent's employees allegedly were exposed to an electrical hazard relating to the receptacle for the Snap-On Plasma Cutter. It was rated at 230 VAC 3-Phase, and was wired in ahead of the fuses and the disconnect switch in the disconnect switch box, on the west wall of the plant. The COs believed, therefore, that the conductors (wires), and the plasma cutter were not protected against overcurrent. Unknown to them, however, the conductors and the plasma cutter were wired to a fuse in a disconnect box located on the east wall which protected the conductors and the plasma cutter from overcurrent.

The York forklift truck used by the Respondent at the time of the inspection was not equipped with seat belts. Ex. 17. The forklift was operated on uneven surfaces and it was top heavy and unstable due to alterations made to it. The failure to provide a seat belt exposed the operator to the risks involved if the fork lift fell over or the operator fell off. Ex. 17.

Respondent's employees were also exposed to the risks of injury arising from the Respondent's use of a Coffing 2-ton chain hoist mounted on the gantry crane in the shop area which was equipped with a loading hook that did not have a safety latch (mousing). As a result, the slings or loads attached to the hoist hooks could become disconnected. The chain hoist was regularly used by the Respondent and its employee's were exposed to a risk of injury from being hit with a falling sling or load.

The step leading to the break room in the Respondent's plant was not secured in position and did not have a uniform rise height throughout the flight of stairs. The step was in regular use by employees who would be exposed to the risk of falling if the step was moved or removed.

After Tierney and Miller had inspected all the items in the employee complaint, but before they had completed their inspection of the plant, Rauschnot demanded a copy of the compliance officers work notes. They refused to provide copies to him and Rauschnot became progressively more demanding. At one point he threw his clipboard on the floor, causing it to break, and told the COs that he would not let them leave the plant until they provided copies of their work notes to him. Rauschnot was so angry and demanding, both Tierney and Miller became afraid for their safety, and Miller called the police in order to get an escort out of the plant. Due to Rauschnot's behavior, the inspection was not completed and the typical closing conference was not held at the plant. Instead, Miller and Tierney held a closing conference with Austing by telephone.

1 Respondent was charged with the violation of a related OSH standard pertaining to lamps. 29 C.F.R. § 1910.305 (a) (2) (iii) (F) (1997). No violation of this standard was established. However, the penalty for the other related violations in Citation 2, Item 8 should not be reduced.

On August 27, 1996 the Complainant issued a citation and notice of penalty to the Respondent charging it with two repeat violations (Citation 1, Items 1 and 2), eleven serious violations (Citation 2, Items 1 - 11) and one nonserious violation (Citation 3, Item 1). The Respondent protested the citations, penalties, and abatement dates by letter dated September 18, 1996. Subsequently, on December 18, 1996, the Complainant issued a Complaint and Summons and Notice to Respondent. On June 3, 1997, the Respondent filed its Answer to the Complaint. This proceeding ensued.

The penalties proposed by the Complainant for each of the violations set forth in the Complaint were calculated using the Complainant's Citation Rating Guide (CRG) (Exs. 20-23) and were based on the probability of injury, the size of the Respondent's business, the gravity of the offenses, the Respondent's good faith, and the Respondent's history of previous violations. The abatement dates for correction of the violations were based upon a consideration of relevant criteria including the nature of the risk posed by the noncomplying condition, the availability of necessary parts, and the relative ease or difficulty of taking corrective action. All the abatement dates were reasonable.

On February 24, 1993, Frank Rauschnot filed a certificate of assumed name with the Minnesota Secretary of State indicating that he was conducting a business named Frank's Welding and Repair at 6840 Dixie Avenue in Inver Grove Heights, Minnesota. Ex. 24.

On August 15, 1995, Respondent was issued a certificate of incorporation by the Minnesota Secretary of State. Ex. 25. Subsequently, on January 4, 1994, Respondent filed a certificate of assumed name with the Secretary of State indicating that Frank Rauschnot was conducting business at 6840 Dixie Avenue in Inver Grove Heights under the name of Industrial Containers & Dumpbox Manufacturing Inc. In correspondence with the Department, Rauschnot has held himself out as the president of Industrial Containers & Dump Box Manufacturing Inc. and of Frank's Welding and Repair. At this time, the corporation has no employees and is being dissolved.

Apart from the repeat citations and the nonserious citation issued by Complainant, the unsafe working conditions at the Respondent's plant on July 2, 1996 created a substantial probability that death or serious physical harm could result therefrom or from one or more practices, mean, methods, operations, or processes adopted or in use at the Respondent's plant. The Respondent knew or should have known of the existence of these violative conditions and would have been aware of them had he implemented an AWAIR program and performed a hazard assessment.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has authority to consider the validity of the citations, penalties and abatement dates proposed by the Complainant under Minn. Stat. §§ 182.661, subd. 3, 182.664 and 14.50 (1996).

2. The Respondent received timely and proper notice of the charges against it and of the time and place of the hearing, and this matter is, therefore, properly before the Administrative Law Judge.

3. The Complainant has complied with all relevant substantive and procedural requirements of law.

4. The Complainant has the burden of proof to establish, by a preponderance of the evidence, the occupational safety and health violations charged against Respondent and the appropriateness of the penalties and abatement dates it fixed.

5. The Respondent was an employer as defined in Minn. Stat. § 182.651, subd. 7 (1996) at the time of the July 2, 1996 inspection.

6. Exhaust fans, such as the fan in the northwest corner of the Respondent's plant, are subject to the following OSH machine guarding standards:

A. 29 C.F. §1910.212 (a)(5) (1996) which states:

> Exposure of blades. When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half (1/2) inch.

B. 29 C.F.R. §1910.219 (d)(1) (1996) which states:

> Pulleys -- (1) Guarding. Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section. Pulleys serving as balance wheels (e.g., punch presses) on which the point of contact between belt and pulley is more than six feet six inches (6 ft. in.) from the floor or platform may be guarded with a disk covering the spokes.

C. 29 C.F.R. §1910.219(e)(1)(i) (1996) which states:

> Belt, rope, and chain drives -- (1) Horizontal belts and ropes. (i) Where both runs of horizontal belts are seven (7) feet or less from the floor level, the guard shall extend to at least fifteen (15) inches above the belt or to a standard height (see Table O-12), except that where both runs of a horizontal belt are 42 inches or less from the floor, the belts shall be fully enclosed in accordance with paragraphs (m) and (o) of this section.

7. The oxygen and acetylene cylinders found on the Respondent's premises at the time of the inspection were subject to the general industry standards set forth in 29 C.F.R. §1910.253 (b)(4)(iii) which states:

> Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet (6.1m) or by a noncombustible barrier at least 5 feet (1.5m) high having a fire-resistance rating of at least one-half hour.

8. The Respondent, being a Minnesota employer, is subject to the provisions of Minn. Stat. § 182.653, subd. 8 (1996) which states, in part, as follows:

> An employer covered by this section must establish a written work place accident and injury reduction program [AWARE] that promotes safe and healthful working conditions and is based on clearly stated goals and objectives for meeting those goals.
>
> * * *
>
> An employer must conduct and document a review of the work place accident and injury reduction program at least annually and document how procedures set forth in the program are met.

9. At the time of the inspection of the Respondent's plant, an exhaust fan near the northwest corner of the plant which was used during painting operations, was subject to the following general industry standards:

A. 29 C.F.R. § 1910.107 (c)(5) which states:

> Combustible residues, areas. Unless specifically approved for locations containing both deposits of readily ignitable residue and explosive vapors, there shall be no electrical equipment in any spraying area, whereon deposits of combustible residues may readily accumulate, except wiring in rigid conduit or in boxes or fittings containing no taps, splices, or terminal connections.

B. 29 C.F.R. § 1910.107 (c)(6) which states:

> Wiring type approved. Electrical wiring and equipment not subject to deposits of combustible residues but located in a spraying area as herein defined shall be of explosion-proof type approved for Class I , group D locations and shall otherwise conform to the provisions of subpart S of this part, for Class I , Division 1, Hazardous locations. Electrical wiring, motors, and other equipment outside of but within twenty (20) feet of any spraying area, and not separated therefrom by partitions, shall not produce sparks under normal operating conditions and shall

otherwise conform to the provisions of subpart S of this part for Class I , Division to 2 Hazardous Locations.

C. 29 C.F.R. § 1910.107 (d)(6) which states:

Belts. Belts shall not enter the duct or booth unless the belt and pulley within the duct or booth are thoroughly enclosed.

10. At the time of the July 2, 1996 inspection the Respondent was subject to the OSH standards in 29 C.F.R. § 1910.132 (d)(1) and (2) (1996) which states:

(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

(i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;

(ii) Communicate selection decisions to each affected employee; and,

(iii) Select PPE that properly fits each affected employee.

(2) The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

11. At the time of the inspection at the time on July 2, 1996 the York forklift truck used by the Respondent was subject to the OSH standard in 29 C.F.R. § 1910.178 (a)(4) (1996) which states:

Modifications and additions [to powered industrial trucks] which affect capacity and safe operation shall not be performed by the customer or user without manufacturers prior written approval. Capacity, operation and maintenance instruction plates, tags, or decals shall be changed accordingly.

12. At time of the July 2, 1996 inspection the Respondent's York forklift truck was subject to the OSH standard set forth in 29 C.F.R. § 1910.178 (q)(1) (1996) which states:

Maintenance of industrial trucks. (1) Any power-operated industrial truck not in safe operating condition shall be removed from service. All repairs shall be made by authorized personnel.

13. At the time of the July 2, 1996 inspection a sledge hammer in the Respondent's plant was subject to the OSH standard set forth in 29 C.F.R. § 1910.242 (a) which states:

> (a) General requirements. Each employer shall be responsible for the safe condition of tools and equipment used by employees, including tools and equipment which may be furnished by employees.

14. At the time of the July 2, 1996 inspection, the Respondent was subject to the OSH standard set forth in 29 C.F.R. § 1910.252 (b)(2)(iii) (1996) which states:

> (iii) Protection from arc welding rays. Where the work permits, the welder should be enclosed in an individual booth painted with a finish of low reflectivity such as zinc oxide (an important factor for absorbing ultraviolet radiations) and lamp black, or shall be enclosed with noncombustible screens similarly painted. Booths and screens shall permit circulation of air at floor level. Workers or other persons adjacent to the welding area shall be protected from the rays by noncombustible or flameproof screens or shields or shall be required to wear appropriate goggles.

15. At the time of the July 2, 1996 inspection of its premises, the Respondent was subject to the OSH standards set forth in 29 C.F.R. §§ 1910.303 (b)(1), 1910.303 (g)(2)(i), 1920.305 (a)(2)(iii)(F), and 1910.305 (b)(2) (1996).

Section 1910.303 (b)(1) states:

Examination, installation, and use of equipment -- (1) Examination. Electrical equipment shall be free from recognized hazards that are likely to cause death or serious physical harm to employees. Safety of equipment shall be determined using the following considerations.

(i) Suitability for installation and use in conformity with the provisions of this subpart. Suitability of equipment for an identified purpose may be evidenced by listing or labeling for that identified purpose.

(ii) Mechanical strength and durability, including, for parts designed to enclose and protect other equipment, the adequacy of the protection thus provided.

(iii) Electrical insulation.

(iv) Heating effects under conditions of use.

(v) Arcing effects.

(vi) Classification by type, size, voltage, current capacity, specific use.

(vii) Other facts which contribute to the practical safeguarding of employees using or likely to come in contact with the equipment.

Section 1910.303 (g)(2)(i) states:

Guarding of live parts.

(i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures, or by any of the following means:

* * *

Section 1910.305 (a)(2)(iii)(F) states:

(F) Lamps for general illumination shall be protected from accidental contact or breakage. Protection shall be provided by elevation of at least seven feet from normal working surface or by suitable fixture or lampholder with a guard.

Section 1910.305 (b)(2) states:

Covers and canopies. All pull boxes, junction boxes, and fittings shall be provided with covers approved for the purpose. If metal covers are used they shall be grounded. In completed installations

each outlet box shall have a cover, face plate or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

16. At the time of the July 2, 1996 inspection the Respondent was subject to the OSH standard in 29 C.F.R. § 1910.304 (e)(1)(i) (1996) which states:

> Protection of conductors and equipment. Conductors and equipment shall be protected from overcurrent in accordance with their ability to safely conduct current.

17. At the time of the July 2, 1996 inspection of its plant, the Respondent was subject to the OSH standard in Minn. R. 5205.0750, subp. 2 which states:

> General requirements. Motorized, self-propelled vehicles shall meet the requirements of Code of Federal Regulations title 29, sections 1926.600, 1926.601 and 1926.602.

18. Under Minn. R. 5205.0750, subp. 2 (1995) and 29 C.F.R. §1926.602 (a)(2) seat belts must be provided which meet the requirements of the Society of Automotive Engineers J386-1969, Seat Belts for Construction Equipment.

19. At the time of the July 2, 1996 inspection the Respondent was subject to the OSH standard in Minn. R. 5205.1210 (1995) which states:

> Safety latches (mousings) shall be provided on all hoist hooks used on hoists or cranes that lift or travel with loads attached. This includes the hook used to attach the hoist to the rail, trolley, or structure.

20. At the time of the July 2, 1996 inspection the Respondent was subject to the OSH standard in 29 C.F.R. § 1910.24 (b) which states:

> (b) Where fixed stairs are required. Fixed stairs shall be provided for access from one structure level to another where operations necessitate regular travel between levels, and for access to operating platforms at any equipment which requires attention routinely during operations. Fixed stairs shall also be provided where access to elevations is daily or at each shift for such proposes as gauging, inspection, regular maintenance, etc., where such work may expose employees to acids, caustics, gases, or other harmful substances, or for which purposes the carrying of tools or equipment by hand is normally required.

* * *

21. The fines proposed by the Commissioner were based on the size of the Respondent's business, the gravity of the violations, the probability of injury, the Respondent's good faith and the Respondent's history of previous violations as required under Minn. Stat. § 182.666, subd. 6 (1995).

22. The citations issued to the Respondent by the Complainant fixed reasonable time limits for the abatement of the violations found. The abatement periods were based on the relative seriousness of the violations and the time needed to correct them.

23. On July 2, 1996, the Respondent was in violation of the OSH regulations and rules set forth in Conclusions 1-15 and 17-20, but was not in violation of the OSH regulations set forth in Conclusion 16. Also, no violation of 29 U.S.C. § 1910.305 (a)(2)(iii)(F) was established. (Citation 2, Item 8). However, the penalty for the other violations included in that Citation should not be reduced.

24. An employers cessation of business is not grounds for dismissal of a penalty proceeding on the grounds that it is moot. Reich v. OSHRC (Jacksonville Shipyards, Inc.), ___F.3d. ___ (11th Cir. 1997) (No. 95-2807, January 7, 1997).

25. Respondent's violations of 29 C.F.R. §1910.212(a)(5), 1910.219(d)(1) and (e)[(1)(i) or (2)(i) or (3)(i)], 1910.219(m) and (o) and 1910.253(b)(4)(iii) (1996) were repeat violations of Minn. Stat. § 182.666, subdivision 1 (1996).

26. The violations involved in Citation 2, Items 1-11 are serious violations as defined in Minn. Stat. § 182.651, subd. 12 (1996).

27. On July 2, 1996 the Respondent's welding shop was subject to the general industry standards in 29 C.F.R. Part 1910 under Minn. Stat. § 182.653, subd. 3 and Minn. R. §5205.0010 (1995).

28. At the time of the July 2, 1996 inspection the COs were authorized to undertake an inspection of the entire premises of the Respondent and were not limited to that portion of the premises specified in the employee complaint. Minn. Stat. § 182.659, subd. 4 (1996).

29. The Complainant was not estopped from charging the Respondent with a violation on the grounds that the same violation cited had not been cited on a previous inspection. See, e.g., Donovan v. Daniel Marr & Son Co., 763 F.2d. 477 (1st Cir. 1985).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That the citations issued to the Respondent on the basis of the July 2, 1996 inspection, except Citation 2, Item 9, are AFFIRMED.

2. That the penalties proposed by the Department for the Respondent's OSH violations were based on appropriate criteria and those penalties -- except the penalty for Citation 2, Item 9 -- are AFFIRMED.

3. The abatement dates set by the Complainant for the correction of the Respondent's OSH violations were shown to be reasonable and those abatement dates are AFFIRMED.

4. That Citation 2, Item 9, its $675.00 penalty, and its abatement date are VACATED.

5. The Respondent shall forthwith pay to the Commissioner of Labor and Industry the sum of Ten Thousand Three Hundred Fifty Dollars.

Dated this 9th day of September, 1997.

/s/
JON L. LUNDE
Administrative Law Judge

Reported: Taped (2 tapes)

MEMORANDUM

I.

In order to establish a *prima facie* violation of OSH standards, the complainant must show that the standard applies to the Respondent, that the Respondent failed to comply with the standard, that an employee had access to the violative condition (exposure), and that the employer knew or should have known of the violative condition with the exercise of reasonable diligence. See, e.g., Dun-par Engineered Forms Co., 12 OSHC 1962, 1986-87 OSHD ¶ 27, 651 (1986). The Complainant, except as otherwise noted below, made a *prima facie* showing of all the violations charged. Most of the violations were in plain view, others had been previously cited, and the others would have been known to the employer had it adopted an AWAIR program and undertaken a hazard assessment.

II.

Under Minn. R. 5210.0570, subp. 4 (1995) an employer's answer to a complaint must contain a short, plain statement denying those allegations in the complaint that a party intends to contest and must include all affirmative defenses. "Any allegation not denied is deemed admitted, and any affirmative defense not asserted is deemed waived." It is questionable whether any of the citations in the complaint were denied. However, complainant did not argue that point and the Administrative Law Judge will not, therefore, decide that issue.

At the hearing, Austing stated that only two citations were disputed:

Citation 2, Item 2, pertaining to spray painting, and Citation 2, Item 9, pertaining to overcurrent protection. Consequently, only those two citations will be discussed.

Austing argued that there was no violation of Citation 2, Item 2 because the Respondent was using water-based, Iowa paints. That argument lacks merit because that brand of water-based paint contains more than one percent xylene or toluene which are volatile, flammable solvents. They have a greater explosive range than equal quantities of gasoline and paint residues containing them are more flammable than the residues of oil based paints. Consequently, Respondent's use of water-based, Iowa paints aggravated rather than lessened the risk of fire and explosion.

Respondent challenged Citation 2, Item 9 on the grounds that the outlet for the Snap-on Plasma Cutter was wired to a disconnect switch and circuit breaker on the east wall of the plant and not on the west wall the COs examined. A three-phase box is pictured in exhibit 15 and would have shut off if the plasma cutter malfunctioned or a short occurred. Tierney questioned why this information was not brought to the COs attention at the time of the inspection and questioned whether the three-phase box was located in a suitable place.

The Administrative Law Judge finds Austing's testimony persuasive and concludes that complainant failed to establish that the conductors and equipment relating to the plasma cutter were not protected from overcurrent. Austing did not challenge most of the citations or the COs testimony regarding them. If she was untruthful, she likely would not have limited her testimony to only two of the violations charged. Furthermore, given Rauschnot's behavior, Austing's failure to mention that the box and fuse were located on a different wall does not weaken her credibility. Although the location of the disconnect box for the plasma cutter may have been inappropriate or violative of some other OSHA standards, the only violation that can be considered in this proceeding in the narrow violation charged. As to it, Complainant failed to meet its burden of proof and that citation should be vacated.

III.

The Respondent raised several defenses to the charges made against it. First, it argued that it was improperly charged with violations of several standards because the violative conditions were not cited offer a previous inspection.

However, the Department is not estopped from charging an employer with a violation simply because the violative condition was not cited during a previous inspection. Donovan v. Daniel Marr & Son Co., 763 F.2d 477 (1st Cir. 1985); Del-Cook Lumber Co., 6 OSHC 1362, 1978 OSHD ¶ 22,544 (1978). When an employer receives erroneous compliance information from a CO, no significant sanction is appropriate until the employer has had notice and an opportunity to correct the condition now determined to be violative of a standard. Columbia Artworks, Inc., 1981 OSHD ¶ 25,737 (1981); Del-Cook Lumber Co., supra. There is no evidence in this proceeding that a compliance officer gave any advice to Respondent regarding violations that were not previously cited. Hence the latter cases do not apply.

The Minnesota courts have recognized that the government can be estopped if justice requires. Mesaba Aviation v. County of Itasca, 250 N.W.2d 877, 880 (Minn. 1977). However, the doctrine is not freely applied. Id. It requires a showing of some element of fault or wrongful conduct on the part of the government. Ridgewood Development Co. v. State, 294 N.W.2d 288, 292-93 (Minn. 1980). Respondent failed to show any fault or wrongful conduct in this proceeding. Complainant's compliance officers made no representations concerning the violations that initially were not cited and gave no assurances that no such violations existed. There was, in short, nothing on which Respondent could rely to its detriment. The employer's estoppel argument is further weakened by the fact that the violative conditions found in 1996 had not been examined during the 1995 inspection (see exhibit 3). In 1995, the COs did not examine other conditions due to Rauschnot's hostile and threatening behavior. Under the circumstances, it is concluded that the Respondent's estoppel defense lacks merit.

Respondent also argued that the citations should be dismissed because it no longer has any employees and is in the process of dissolution. Under the circumstances, it suggested that the citations are moot. However, it is not a valid defense to an OSHA citation that an employer was in the process of dissolution at the time of an inspection. Winfrey Structural Concrete Co., 10 OSHC 1270, 1981 OSHD ¶ 25,805 (1981). Likewise, it is not a defense that the employer went out of business after the citation was issued. Price-Potashnick-Codell-Oman, 6 OSHC 1901, 1978 OSHD ¶ 22,935 (1978), petition for review dismissed, No. 78-3203 (9th Cir. 1978). More recently, the Ninth Circuit held that an employer's cessation of business is not grounds for dismissal of an OSHA penalty proceeding. Reich v. OSHRC (Jacksonville Shipyards, Inc.) ___F.3d. ___ (9th Cir. 1997) (No. 95-2807, January 7, 1997). The federal review commission has followed that holding. See, Continental Roof Systems, Inc., OSHD ¶ 31,351; Meridian Contractors, Inc., OSHD ¶ 31,347. It is concluded, based on these cases and decisions, that the Respondent's dissolution is immaterial.

In its protest, Respondent suggested that the COs exceeded the permissible scope of the inspection because conditions in addition to those in an employee's complaint were examined. That argument lacked merit. Minn. Stat.

§ 182.659, subd. 4 specifically authorizes an inspection of the entire premises after an employee complaint. It states, in part:

> . . .An inspection conducted pursuant to a complaint [of an employee] may cover all of the premises of the employer and shall not be limited to that portion of the premises specified in the notice [of complaint].

Based on the cited statute it is concluded that the COs did not exceed the permissible scope of their inspection of the Respondent's plant on July 2, 1996.

Employers are not required to consent to inspections. If they refuse to consent, the Fourth Amendment requires the agency to obtain a warrant. Consent may be given by any competent management official. See, e.g., Dorsey Electric Co. v. OSHRC, 553 F.2d 357 (4th Cir. 1977). Consent need not be express and the failure to object to a known search constitutes consent. United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir. 1970), cert. den. 400 U.S. 926, 91 S.Ct. 188, 27 L.Ed.2d 185 (1970) rehearing denied 400 U.S. 1002 (1971). The failure to warn an employer of its right to insist on a warrant does not make the consent unknowing or involuntary. Daniel International Corp., 9 OSHC 1980, 1981 OSHD ¶ 25, 492 (1981), reversed on other grounds 683 F.2d 361 (11th Cir. 1982). If asked, however, COs must advise an employer that it has the right to refuse a warrantless inspection. United States v. Anile, 352 F. Supp. 14 (N.D.W.Va. 1973). A CO may not mislead, coerce, intimidate or threaten an employer but must answer in a straightforward manner if asked about an employer's right to refuse an inspection. United States v. Kramer Grocery Co., 418 F.2d 987 (8 Cir. 1969).

There is some evidence in the record suggesting that the search was not wholly consensual. However, that affirmative defense was not raised in the pleadings, in testimony or in argument, and there is no persuasive evidence in the record that Austing or Rauschnot asked the COs about their right to refuse an inspection or any evidence that the COs did not answer those questions in a straightforward manner. On the contrary, the record supports a finding that the search was consentual.

The Respondent also suggests that it cannot be charged with a repeat violation of OSHA standards because the first violation was committed by the Respondent's predecessor, a sole proprietorship operated by Rauschnot. That argument is not persuasive. The first violations of the standards which were later violated again occurred before Respondent was incorporated. However, Rauschnot and Austing previously were, and continued to be, owners or chief officers of the business. They have always run the business and were involved in both OSH inspections. The only changes they made consisted of the name and organizational structure of their business. For these reasons, it is concluded that the corporation is a mere continuation of its predecessor and that it is appropriate to charge the Respondent for repeat violations which originally occurred before the Respondent was incorporated. Turnbull Millwork Co., 1976-

1977 OSHD ¶ 20,904 (1976); Willamette Iron & Steel Co., 1976-1977 OSHD ¶ 20,702 (1976). Cf. The Flexible Corporation, 1984 OSHD ¶ 27,063 (1984).

Under Minn. Stat. § 182.666, subd. 1, repeated OSH violations are subject to higher penalties. In Potlatch Corp., 7 OSHRC 1061, 1979 OSHD ¶ 23, 294 (1979) the Federal Review Commission held that a violation is repeated if at the time it occurs there was a final commission order against the same employer for a substantially similar violation. A *prima facie* case can be met by showing that the prior and present violations involve noncompliance with the same standard. The two repeat citations in this proceeding involve substantially the same violations, and the initial citations, which were not protested or appealed, became a final order of the commissioner before the second violations occurred. Hence, both repeat citations should be affirmed.

J.L.L.